JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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In response to an inquiry concerning a murder case in Alabama that has attracted wide attention because of its having been submitted the fifth time in the Supreme Court of the state, we have the following letter from Mr. J. R. Thomas, of Montgomery, Ala., dated Jan. 26, 1914.—[Ed.]:

"I find that Ervin Pope was convicted of murder in the first degree in the City Court of Anniston, and appealed his case to the Supreme Court. See *Pope v. the State*, 168 Ala. 33, (53 So. 292). The case was decided May 12, 1910, rehearing denied June 30th, 1910. In that case the court affirmed the judgment of the lower court, holding there was no error in the record, but upon a rehearing (see page 43 of the same report) the court decided that:

> "'The fact that Amos Montgomery testified that he sent for the cotton seed Tuesday morning was but permitting him to narrate a fact of his own production and which tended to corroborate his previous statement that defendant told him to send for the seed Tuesday morning. As a general rule, a witness cannot corroborate himself or fortify his testimony by proving his declaration and his acts. * * * The trial court erred in not excluding the statement of Amos Montgomery that he sent for the seed and did not get them. * * * The rehearing is granted, and the cause is reversed and remanded.'

"I find in the case of *Pope v. the State,* 174 Ala. 63, (57 So. 245) decided Dec. 21, 1911, that Ervin Pope was convicted of murder and appealed. In that case the court held that:

"'A witness who has examined a track of a defendant may state that it corresponded with the track made by him with which the witness compared it by measurement and certain peculiarities, and also that two tracks measured the same, a witness may not testify that a certain shoe or foot would or could make a particular track.' (8th head-note.)

"The majority of the court in that cause on the first hearing affirmed the cause, but on the rehearing all of the justices sitting concurred in a reversal of the cause. On the rehearing the court says:

"'As appears from the original opinion, the court unanimously held or attempts to show that John Body was not the party who murdered McClurkin was erroneous as a matter of law. The theory is that Body and not the defendant committed the murder. See *Pope v. State,* 61 So. 263, decided Feb. 6, 1913, where the cause was again appealed from the City Court of Anniston and was reversed and remanded. In that case the court says:

> "'The appellant has been thrice tried, convicted and sentenced to death, and the case is now before this court for the third time on appeal.' The court further said, the trial court allowed the state to ask the witness Dodgen, 'Could the John Body mule have made the tracks that you tracked from the peach tree around the route that you described?'

"'The witness answered: 'No,' and defendant's motion to exclude the answer, for the same reason, was overruled.'

"'This same question was directly presented on the second appeal, and we distinctly ruled that the allowance of such a question was "manifest error" under the former decisions of this court, which were reviewed, and the judgment of conviction was reversed solely on that proposition. * * * Those decisions hold that in such cases as this the witness must state the facts, and *leave to the jury* the conclusion sought to be elicited; and they clearly forbid the statement of the witness' conclusion, whether with or without a statement of facts upon which it is founded.'

"The case was again appealed to the Supreme Court from the City Court of Anniston: (See *Pope v. State,* 63 So. 71), decided June 30th, 1913, the case was reversed, all of the justices concurring except two dissenting. (1st head-note.)

"'Inability to find a witness in order to produce him at a trial is a sufficient foundation for the admission of his testimony at a former trial, even though it is not affirmatively shown that he is dead, insane, or beyond the jurisdiction of the court.'

"At the trial now under review the defendant offered to prove by T. C. Sensabaugh the testimony of John Body sworn to at the first trial of this case, the testimony offered being as follows: and here follows in the bill of exceptions a statement of the proposed testimony. The objection interposed to this testimony of the absent witness by the state's solicitor was that 'it was not properly predicated, that it was not shown that Body was dead or had removed from the state.' The court sustained this objection, and the defendant duly excepted."

"I have not had a chance to see what the record shows, yet the state press has reported the case as having been submitted in the Supreme Court for the fifth time and it is my understanding that the last sentence was a death sentence also. The Supreme Court has not decided the last appeal, as it was only submitted a weak or two ago."

J. R. THOMAS, Montgomery, Ala.

APPEAL.

People v. St. Maurice, Cal., 135 Pac. 952. *Death of Appellant.* Defendant was convicted of a crime and sentenced to pay a fine or in default thereof to be imprisoned. The judgment was affirmed by the court of appeal, and from this affirmance she appealed to the Supreme Court. While this last appeal was pending she died. The statutes provide that execution may be issued on a judgment imposing a fine, as on a judgment in a civil action and that such judgment constitutes a lien. Held, that the death of the appellant would cause all proceedings in the matter and especially under the judgment therein rendered, to abate.

People v. Schultz, Ill., 102 N. E. 1045. *Prejudicial error.* Error in permitting a physician to testify that, according to the history of the case and to his findings, he thought it was a case of rape was prejudicial, where the court refused to permit another physician who had examined prosecutrix to state whether rape had been committed, and the prosecuting attorney in argument quoted as a proven fact the witness' opinion that prosecutrix's inflamed condition was caused by rape.

ASSAULT WITH INTENT TO MURDER.

Leary v. State, Ga. App., 79 S. E. 584. *Remoteness.* Defendant was charged with assault with intent to murder by maliciously putting broken glass into food with intent that the food should be eaten by another and that he should in this manner be killed. The indictment did not allege that the intended victim ate the food or that the defendant administered it to him. Held, that the facts charged did not constitute the offense and a conviction was reversed.

BIGAMY.

People v. Shaw, Ill. 102 N. E. 1031. *Common law marriage.* In a prosecution for bigamy, where accused's first marriage was invalid because the woman had a husband then living, and the law of the state where it was celebrated did not recognize the divorce obtained by the parties within a second state which might recognize such divorce will not create a common-law marriage; it not appearing that the parties desired a common-law marriage, but that they cohabited by virtue of the former ceremonial marriage. Dunn and Farmer, JJ., dissenting.

BURGLARY.

State v. Lapoint, Vt., 88 Atl. 523. *Breaking.* One who found the door of a freight car partly open and pushed it further open in order to effect an entry for the purpose of committing larceny therein commits a "breaking," which is sufficient to support a charge of burglary, since the breaking is the removal of an obstruction which, if left as found, would prevent an entrance, and the fact that a portion of the space needed for the entrance was already open should not relieve the defendant from the penalty.

COMPROMISE OF CRIMINAL PROSECUTION.

Willingham v. U. S., 208 Fed. 137. Rev. St. Sec. 3229, provides that the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws. Held, that, where a deputy collector, finding that accused was selling liquor without having paid the special tax, agreed that, if defendant would pay the tax and penalty, the collector would not institute criminal proceedings, and defendant complied with such request, whereupon the collector turned over the payment to his superior and issued the certificate required by law, it would be presumed that the collector disclosed the offer of compromise and that the same was accepted, the money having been retained by the Treasury Department; and hence, in a subsequent criminal proceeding for selling liquor in violation of the law, accused was entitled to an instruction that, if defendant was promised immunity in consideration of his payment of the tax and in consideration thereof he did so, the jury should find him not guilty. Shelby, J., dissenting.

CONSTITUTIONAL LAW.

State v. Gurry, Md., 88 Atl. 546. *Police power.* An ordinance prohibiting white or colored persons moving into or using as a residence a building in a block, the buildings on which are occupied or used as residences by members of the other race, is too unreasonable to permit an assumption that the legislature, by its grant of the general police power in the Baltimore city charter, intended to confer on the city the power to enact it, since it wholly ignores vested rights, by making it unlawful for one owning property, which it was perfectly lawful for him to own and use when he became its owner, to move

such property or rent it, except to members of a particular race, thus practically confiscating it, by compelling him to allow it to remain idle or to sell it at a possible sacrifice.

People ex rel. Raymond v. Warden of City Prison, 143 N. Y. Supp. 912. *Abatement of disorderly house.* Penal Law (Consol. Laws 1909 c. 40) Sec. 1146, provides that whoever, as owner, agent, or lessor, agrees to lease any building or part thereof, knowing that it is intended to use the same for immoral purposes, or whoever, as owner, agent or lessor, knowingly or with good reason to know, permits a house or any part of a building of which he may be the owner, agent or lessor to be so used shall be guilty of a misdemeanor. Tenement House Act (Consol. Laws 1909 c. 61) Sec. 153, as amended by Laws 1913, c. 598, provides that a tenement house shall be deemed to have been used for immoral purposes with the permission of the owner if there shall have been two or more convictions for the same tenement house within six months, either for violation of section 150 of the chapter, relating to disorderly houses, or of Penal Law, Sec. 1146. Held, that such provision, attempting to make two convictions from the same house conclusive evidence of knowledge on the part of the owner, agent or lessor for the purpose of sustaining a conviction against him for violating section 1146, was unconstitutional, as depriving him of the right to a fair trial, and as amounting to a confiscation of his property.

CONSTRUCTION OF STATUTES.

City of Anderson v. Fant, S. Car. 79 S. E. 641. *Strictly construed.* City ordinances provide for the punishment of any person who should "sell, barter, exchange or give away in connection with business or trade" intoxicating liquors, or "transport, handle, store or conceal" such liquors. There were state statutes to the same effect. The defendant was convicted of transporting such liquors, on proof that at the request of two white men he had bought two pints of whiskey, in the city, from a person whom he knew was not authorized to sell, and had carried and delivered the whiskey to the white men. Held, that a case must fall within the spirit as well as within the letter of a criminal statute. The policy of the state, as indicated in its statutes, was to punish the seller of intoxicants, but not the buyer. The defendant was acting as agent for the buyers, consequently was not within the spirit of the statutes. The conviction was reversed.

State v. Render, Ia., 144 N. W. 298. *"House" includes a hack.* The defendant was convicted of keeping a house of ill fame. The proof was that he was a public hack driver, and repeatedly permitted his hack to be used for lewd purposes. Held, that the word house would cover a hack when so used. The conviction was affirmed.

DEFENSES.

Bennett v. State, Miss., 63 So. 339. *Failure to set up at trial.* Defendant was convicted of bigamy, appealed, and the conviction was affirmed. He then filed a petition for a writ of error *coram nobis* on the grounds that he had been legally divorced from his first wife, and that his second marriage was void because contracted under duress. As these facts existed at the time of the trial, and no sufficient reason was shown for the failure to prove them at that time, the order denying the writ was affirmed.

DETECTIVES.

People v. Newbold, Ill. 103 M. E. 69. *Weight of evidence.* An instruction that greater care should be exercised in weighing the testimony of informers, detectives, and other persons specially employed to hunt up evidence against accused than in the case of disinterested witnesses, was properly refused, since the testimony of informers and detectives must be weighed according to the same rules governing other witnesses; the jury being only required to consider the fact that they are informers and detectives in determining the credibility to which they are entitled under all the circumstances of the case.

FORMER JEOPARDY.

Fortson v. State, Ga. App,. 79 S. E. 746. *When jeopardy begins.* The Georgia statute provides that a *nolle prosequi* may, without the consent of the accused, be entered at any time before the case has been submitted to the jury. After the jury had been stricken and had taken their seats in the jury box, but before they had been sworn, a prosecution was *nolle prossed.* On subsequent prosecution the accused pleaded former jeopardy. Held, that as the jury had not been sworn, the defendant had not been in jeopardy. It was not decided whether jeopardy begins immediately after the jury are sworn.

HARMLESS ERROR.

Quinlan v. State, Ga. App. 797, S. E. 768. *Refusal to extend time for argument.* A rule of the court allowed counsel for the defense in a prosecution for misdemeanor thirty minutes for argument, but provided that the court may grant an extension of time. Held, that as the evidence demanded a conviction, no amount of argument could have helped the accused. The judgment of conviction was affirmed.

HOMICIDE.

State v. James, Minn., 144 N. W. 216. *Cause of death.* Defendant stabbed deceased, inflicting one wound which penetrated the lung, and a minor injury. Deceased was taken to the hospital, and for forty-eight hours seemed about to recover. Pneumonia then developed and he died of that disease in eight days from the time when he was stabbed. The disease was confined to the injured lung. There was evidence that the germs causing the disease could have reached the lung either by being inhaled or through the wound, that the disease developed when it would have done had the germs entered through the wound and that symptoms which usually attend the disease when the germs are inhaled were not present. Held, that the evidence was sufficient to justify the jury in finding that the germs reached the lung through the wound, so that the death was caused by the defendant's act. The conviction of murder in the second degree was affirmed.

Comm. v. Exler, Pa., S. C. W. D., Oct. Term, 1913, No. 220 (not yet reported). Held, in a *per curiam* opinion reversing O. and T. of Allegheny Co., the ingredients of murder in the first degree are not present in a case where it is charged that the prisoner had caused the death of a young girl, twelve and a half years of age, in consequence of an attempt to commit rape, but where there was no evidence that the attempt was made against the will of the victim. The statutory provision that homicide in an attempt to commit rape shall be murder in the first degree has reference only to rape in its common law meaning. The fact that since the enactment of the Criminal Code, statutory rape may be

committed on a female under the age of sixteen years, with her consent, does not make homicide, resulting from such a rape, murder in the first degree. See Leg. Int., Vol. LXXI, p. 58.

J. L.

BURDEN OF PROOF OF INSANITY IN HOMICIDE CASES.

Commonwealth v. Calhoun, 238 Pa. 474. In a homicide case the burden of proof of insanity is with the defense from the beginning and is never shifted.

The defense of moral insanity or irresistible impulse can only be recognized in the clearest cases, where it is shown to have been habitual, or at least to have evinced itself on more than a single instance. To establish it as a justification in any particular case it is necessary either to show, by clear proof, its contemporaneous existence by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature.

Proof that insanity has existed at any indefinite time in the past does not raise the presumption in law, sufficient to excuse a homicide, that it continued up to the time of the committing of the crime at some subsequent date; much clearer proof of insanity at the time of the commission of the deed is required.

Proof of the existence of delusions of a character that "might produce" an irresistible impulse to take life is insufficient to excuse a homicide, without proof that the delusions were of a character that would have a tendency to produce such an irresistible impulse.

Upon the trial of an indictment for murder, where the defense relied upon was insanity in the form of delusions of oppression and threats against the defendant's life, which produced homicidal mania at the time of the killing, it appeared that the defendant had been a boarder at the home of the deceased, who had ordered him out of the house a short time before the homicide; that a few days prior to the shooting the defendant had borrowed a gun and on the afternoon of the shooting he had returned to the residence of the deceased and deposited the gun on the porch; that in the evening the deceased upon opening the door in response to a rap was shot in the head by the defendant who stood on the outside with the weapon in his hand. The defendant in a voluntary confession said that he had committed the deed because the deceased had treated his own wife badly and had threatened defendant's life. There was testimony that the deceased had had improper relations with the defendant's wife. The defendant testifying in his own behalf said that he did not remember what he did after taking up the gun and that his first realization that he had killed the deceased came at a later time, and also that he did not know just what he had in mind when he entered the yard. He testified further that the so-called threats all antedated the killing, and he did not say that at the time of the homicide he had any immediate hallucinations or that he was forced by an irresistible impulse to kill deceased. The evidence depended upon to show insanity tended to show that the defendant was melancholy by nature and from time to time imagined that others wanted to harm or to kill him; but that he was normally a mild-mannered man who did not attempt harm. There was no testimony that his alleged delusions had in the past ever impelled him to attempt to punish, much less to kill, his supposed enemies, and the only testimony concerning homicidal tendencies was that of an expert witness who testified that "many cases of paranoia have homicidal tendencies." Held, a verdict of guilty of murder in the first degree was justified. J. L.

FLEEING FELONS.

Defendant was convicted by a trial court in California of manslaughter, and sentenced for a long term in the penitentiary. It appears that deceased had entered the home of a woman in the tenderloin district of the town for the purpose of committing robbery. The case does not state whether he succeeded in the attempt, but he did, however, knock the unfortunate one down, causing her to scream, "Stop thief!" "Murder!" "Police!" etc. Thereupon deceased took to flight. People in the street were attracted by the noise, and on seeing the fleeing felon began pursuing him. Defendant, who was attending his saloon at the time, heard the cries above mentioned, and, taking a pistol from a shelf, proceeded to take up the pursuit with the others. He yelled several times at the culprit to stop, but with no avail, and finally, when within about 20 feet of him, shot and killed him. The evidence in the case clearly showed that defendant's only purpose in firing the shot was to apprehend the felon, and that he had good cause to believe that deceased had committed a crime. The District Court of Appeal of California in reviewing the case quoted Wharton on Homicide to the effect that "even a private person is justified in killing a fleeing felon, who cannot otherwise be taken, if he can prove that the person is actually guilty of the felony"; and adding that "if officers and citizens are to be punished for an effort to suppress crime, and to bring to justice those who commit offenses against the law, it is but offering a premium for crime." Judgment of conviction reversed. *People v. Lillard,* 123 Pacific Reporter, 221.

IMMATERIAL ERROR.

Sayers v. State, Okla., Cr. App., 135 Pac. 944. *Variance between verdict and judgment.* On a verdict finding the defendant "guilty of rape in the second degree," a judgment was entered that the defendant was guilty of "rape in the first degree." Defendant contended on appeal that the case must be remanded for judgment. Held, that as the word "first" in the judgment was obviously a clerical mistake, and a statute provided that no judgment should be set aside for error in procedure, unless after an examination of the entire record, "it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right," the judgment should be modified in the appellate court so as to conform to the verdict of the jury.

INCEST.

People v. Turner, Ill. 102 N. E. 1036. *Accomplice.* Under the statute declaring that if a father shall rudely and licentiously cohabit with his own daughter, he shall be confined in the penitentiary not exceeding 20 years, the daughter cannot be an accomplice; and so a charge that the daughter's testimony should be received with caution because she was an accomplice is properly received, though she admitted she enjoyed the sexual intercourse.

INDETERMINATE SENTENCE LAW.

Ex Parte Marshall, Tex. Cr. App., 161 S. W. 112. *Particular act void for indefiniteness.* The Penal Code required the jury, on a verdict of conviction, to assess the penalty, where it was not definitely fixed by statute. The indeterminate sentence law, subsequently enacted, provided that when the jury did not inflict the death penalty, they should not assess the penalty, but the judge should sentence the convict to a minimum and maximum term in the penitentiary,

"the minimum period being the least number of years affixed by law as punishment for said offense, and the maximum period the maximum term fixed by law." The relator was indicted, the jury found him guilty, and the judge sentenced him to not less than one nor more than three years in the penitentiary. He then brought *habeas corpus,* claiming that the verdict and sentence were void. Held, that the constitutional right to trial by jury does not require that the jury shall assess the punishment. But as the indeterminate sentence law applied to all felonies, and some felonies were punishable by fine or imprisonment, the statute in such cases required the court to impose a sentence of the minimum fine or the maximum imprisonment which would be unworkable. Hence the act was void for indefiniteness, and the prior provision of the Penal Code was still in force. The prisoner was remanded for a new trial under the indictment.

To reach this result the prevailing opinion misquoted the act, making it read that the judge must impose the minimum and the maximum "punishment" fixed by law. The difficulty was that there were three possible punishments for felony, death, imprisonment, a fine. Under the old law all were imposed by the jury. Under the new the jury imposed the death penalty, the judge sentenced to imprisonment, but no one was authorized to fine. The new act expressly took from the jury the power to fix the penalty, except that of death. It did not give the judge the power to fine. It would seem that the court might have held that the new act obviously applied to the first two penalties only, and that the prior law remained in force as to fines. A literal construction of the act would have led to the conclusion that the power to fine was suspended, not that the power of the judge to sentence was indefinite. As another indeterminate sentence law had already been enacted at a special session, and the court expressly restricted its opinion to the act passed at the regular session, the consequences of the decision will not be serious.

INDICTMENT AND INFORMATION.

People v. Hallberg, Ill., 102 N. E. 1005. *Certainty.* An indictment, containing an averment to avoid the bar of the statute of limitations, that accused and another with whom he was charged to have committed the crime "not being a resident within the state," is insufficient for uncertainty and will be quashed on motion, since the word "resident" was used as a noun rather than an adjective and in the singular form, and it cannot be told whether it refers to the accused or the other party. Farmer, Carter and Dunn, JJ., dissenting.

Trueheart v. State, Ga. App., 79 S. E. 755. *Sufficiency.* An indictment for embezzlement which charges that the defendant was cashier of a specified company and as such cashier was in possession of a specified sum of money and being as such charged with the possession, safety and care of such money, he did embezzle, steal, secrete, and fraudulently take and carry the money away is not too vague and indefinite because it fails to allege the fund or funds the accused is charged with embezzling, from whom the funds were obtained, on what accounts the money was obtained, or how the money came into his possession. A conviction on the indictment was sustained.

JURY.

Renfroe v. State, Ga. App., 79 S. E. 758. *Coercion.* After a jury had considered a case for 18 or 20 hours, being unable to agree they called the sheriff and requested him to ask the court either to recharge the jury or order

a mistrial. The sheriff said if they wanted a new charge he would go down and submit it, but "if it is a mistrial, I would feel embarrassed to do it, because I have heard the judge say that he was conscientiously opposed to mistrials in Wilcox county. But I will submit it if you insist on it." The jury did not insist on their request, and shortly afterwards returned a verdict of guilty. Upon the motion for a new trial these facts appeared, and there was no affidavit of any of the jurors to the effect that they were not influenced by the conduct of the sheriff to return a verdict of guilty. Held, that the sheriff's remark improperly interfered with the deliberations of the jury and amounted to coercion, and that a new trial should have been granted. The judgment of conviction was reversed.

LARCENY.

Hunter v. State, Ga. App., 79 S. E. 752. *Criminal intent.* The defendant was indicted for cattle stealing. The jury were charged that, although the killing was accidental, if the defendants thereafter formed the intention of converting the carcass to their own use, they would be guilty. Held, that the charge was error and the court should have instructed the jury, though there was no request, that if the intention to steal was not formed until after the killing of the cow the defendants would not be guilty of cattle stealing. The conviction was reversed.

People v. Barnes, 143 N. Y. Supp. 885. *Taking.* The president of a corporation, by withdrawing its funds from the bank in which they were deposited and placing them as its money in a safe deposit box hired for the company in the name of himself and other officers, did not commit larceny, though the funds thereafter were wholly within his control; they having been for all practical purposes equally within his control when on deposit in the bank; but evidence that the president of a corporation took its money from a safe deposit box in which it had been placed for safe keeping with the intention of using it for his own purposes, and that he took it to a broker's office and purchased stocks therewith in his own name and for his own account, would support a conviction either for common-law larceny or for statutory larceny, consisting of an appropriation of the funds of another in control of the party appropriating them, and hence counts for both offenses were properly submitted to the jury, since so far as the charge of common-law larceny was concerned, the evidence as to what the president did with the money indicated the felonious intent with which it was taken.

NEW TRIAL.

Commonwealth v. Potts, Pa., 88 Atl. 483. *Misdescription of juror.* That a juror was misdescribed as to his first name did not require the granting of a new trial after a judgment of death in a homicide case, where he was accurately described as to the residence and middle name and last name, and there was no resident of the town known by the name erroneously applied to him, and the juror acted in good faith without intentionally impersonating another, and his answers, when examined on his voir dire, were sufficient to put defendant's counsel on notice of the facts.

Hopkins v. State, Ind., 102 N. E. 851. *Newly discovered evidence. Insanity.* When a defendant, charged with an assault with intent to murder, defended on the ground of self-defense, newly discovered evidence as to his insanity was not newly discovered as to the issues in the case, no plea of insanity having been imposed, and does not require the granting of a new trial.

OFFICERS.

State v. Roth, Iowa, 144 N. W. 339. *Removal for non-enforcement of law.* 33 G. A. Ch. 78 provides for the removal of certain officers by the district court "for wilful or habitual neglect or refusal to perform the duties of his office." Before the games in the professional league began, a number of citizens applied to the mayor and chief of police to prevent baseball games on Sunday. The mayor referred the matter to the city solicitor, who gave an opinion that neither the statutes of the state nor the ordinances of the city prohibited the playing of baseball games, whether amateur or professional, on Sunday. In conformity with this opinion the mayor refused to institute criminal proceedings against the managers and players, but notified the petitioners that if they wished to swear out informations, the police force would serve the warrants. In accordance with the opinion of the city solicitor, the superintendent of public safety ordered the chief of police not to interfere with the games, except by serving any warrants that might be issued. The officers were reputable men, and it was conceded that they would do their full duty if they knew what it was, though possibly in sympathy with Sunday ball, and reluctant, on that account and because of local public sentiment, to stop it. Held, that "wilfully" meant "intentionally, deliberately, with a bad or evil purpose, contrary to a known duty."

The court did not decide whether the statute prohibited Sunday baseball, but if it did the refusal of the officers to enforce it was not wilful under this definition. The fact that it was customary for the city officers to leave prosecutions for violations of the state statutes to the county attorney, or the advice of counsel, or the order of the chief's superior officer, would not of themselves be a defense, but should be considered in determining whether the defendants acted in good faith. A judgment refusing to remove him was affirmed.

PARDON.

Ex parte Crump, Okla. Cr. App., 135 Pac. 428. *By Lieutenant-Governor.* On July 31, the governor of Oklahoma left the state temporarily, giving his chief clerk instructions to communicate with him if any matter involving executive action should be presented. On August 2, the lientenant-governor, as acting governor, issued a pardon to a convict imprisoned in the penitentiary. The pardon was under the great seal of the state, and attested by the secretary of state. The governor returned on the morning of August 3, and issued an order under the great seal of the state, and attested by the secretary of state, revoking the pardon. The pardon had been delivered to the prisoner's father, but had not then been presented to the warden of the penitentiary. When it was presented the warden refused to recognize it, and the prisoner applied for a writ of *habeas corpus.* The constitution of the state provides that in case of the governor's "removal from the state," the powers, duties and compensation of the office "shall devolve on the lieutenant-governor, for the residue of the term or until the disability shall be removed." It further provides for succession to the office when the lieutenant-governor was acting as governor in case he should "be absent from the state." Held, that the lieutenant-governor was at least a *de facto* officer, when he issued the pardon, hence the pardon would be valid. But the court held further that the words "removal from the state" in one section were synonymous with "be absent from the state" in the other. It took judicial notice that the executive department had previously treated the

temporary absence of the governor from the state, as devolving the office upon the lieutenant-governor during such absence, and said that it would not reverse such executive construction of the constitution unless it was clearly and manifestly wrong. That the governor by his absence from the state, for the time being abdicated the constitutional functions of his offce and they devolved upon the lieutenant-governor. A pardon takes effect when delivered and the governor has no power to revoke it after it has once taken effect. Hence the prisoner was discharged.

RAPE.

People v. Schultz, Ill., 102 N. E. 1045. *Age.* Burden of proof under Criminal Code, par. 237, making guilty of rape every male 16 years of age and upwards who has carnal knowledge of any female forcibly and against her will, the burden of proving that accused was under 16 years of age was upon him.

TRIAL.

State v. Gunderson, N. D., 144 N. W. 659. *Improper argument.* In argument the state's attorney said "I do not come here to try a case unless the defendant is guilty." The court admonished the attorney that the remark was improper and suggested that he should not refer to his opinions in his further address to the jury. The evidence of defendant's guilt was very unsatisfactory. Held, that the statement of the prosecuting attorney constituted legal error which was not cured by the court's admonition. The conviction was reversed. One judge concurred on the ground that the evidence was not sufficient to support the conviction.